

STEP 5: WHAT TYPE OF SECTION 401 CERTIFICATION IS REQUIRED FOR THE ACTIVITY?

The fifth step is to identify the type of Section 401 water quality certification required for the activity, and prepare a certification application if required.

A. Definitions

Section 401 of the Clean Water Act states that

"Any applicant for a [f]ederal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into...[waters of the US], shall provide the licensing or permitting agency a certification from the [s]tate in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the...waters [of the US] at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title" (pertaining to effluent standards [33 U.S. Code 1341; Attachment 5-1]).

Section 401 jurisdiction is primarily determined by the classification of waters of the US to be impacted (tribal, unique, or other) by an activity. As defined earlier, tribal waters occur on tribal lands. In Arizona, unique waters are designated by ADEQ, under Arizona Administrative Code (AAC) Article 1, Section R18-11-112—Unique Waters (Attachment 5-2). This code identifies criteria that classify a surface water as a unique water, pertaining to flow, water quality, recreational and ecological significance, and association with threatened or endangered species (as listed by USFWS under the Endangered Species Act [AAC Article 1, R18-11-112]). Other waters include all non-tribal and non-unique waters.

B. Certification for Activities that Qualify for a Nationwide Permit

As discussed in earlier sections, Section 401 certification requirements vary by NWP. For example, NWP 14, Linear Transportation Projects, carries the following Section 401 certification requirements in Arizona:

- Tribal Waters—Individual certification from the Navajo Nation, Hualapai Tribe, and White Mountain Apache Tribe (WMAT); individual certification from the EPG required for all other Reservations
- Unique Waters—Individual Certification required
- Other Waters—Conditional Certification
- Impaired Waters—Individual Certification required
- Lakes—Individual Certification required (the list of lakes is on every Nationwide Permit)



1. Certified

Continuing with this example, if a linear transportation project on the Fort Apache Reservation met all NWP 14 criteria/limitations and applicable NWP general and regional conditions, the project would need individual certification from the WMAT.

2. Individual Certification

Continuing with the example of NWP 14, if the linear transportation project was located on a Reservation other than the Navajo Nation, Hualapai Tribe, and Fort Apache¹, or would impact a unique or impaired water, a Section 401 Individual Certification would be required for the project.

- On Reservation lands (other than Fort Apache Reservation)—an Individual Certification is obtained through application to EPA (application components defined in later sections) and activity-specific Section 401 conditions are defined and enforced by EPA
- On non-Reservation lands—an Individual Certification is obtained through application to ADEQ (application components defined in later sections) and activity-specific Section 401 conditions are defined and enforced by ADEQ

If a NWP PCN submittal is required for the activity, a copy of the EPA or ADEQ Individual Certification approval letter must be forwarded to the Corps.

3. Conditional Certification

Continuing with the example of NWP 14, if the linear transportation project would impact other waters, the project would be Conditionally Certified under Section 401. No certification application would be required, but the project proponent would be required to comply with the 14 Section 401 conditions listed on NWP 14 (defined and enforced by ADEQ) in order for the Conditional Certification to be valid. If the Section 401 conditions cannot be met, an Individual Certification would be required.

For all NWPs, including NWP 14, two Section 401 conditions have been modified for ADOT activities as a result of an agreement between ADEQ and ADOT. The affected conditions pertain to requirements to obtain other permits, certifications and licenses for an activity, and limitations on the size of construction materials. For most NWPs, these conditions are numbered 2 and 4, respectively. Appendix 6 identifies the original and modified wording for both conditions. The modified wording must be used by activity proponents in the environmental clearance and/or project specifications, as appropriate.

¹To date, the Navajo Nation, Hualapai Tribe, and WMAT (on the Fort Apache Reservation), are the only Arizona tribes that have been granted authority by EPA over Section 401 compliance for waters of the US within its Reservation boundaries.

C. Certification for Activities that Require an Individual Permit

A Section 401 Individual Certification is required for all activities that require an Individual Permit. As with activities that qualify for NWPs, an Individual Certification for Individual Permit activities on Reservation lands (other than Fort Apache Reservation) is obtained through application to EPA, and activity-specific conditions are defined and enforced by EPA. An Individual Certification for Individual Permit activities on non-Reservation lands is obtained through application to ADEQ, and activity-specific conditions are defined and enforced by ADEQ.

A copy of the EPA or ADEQ Individual Certification approval letter must be forwarded to the Corps.

D. Components of an Individual Certification Application

1. Individual Certification Application to the Environmental Protection Agency

EPA has not developed a standard Individual Certification application format. However, all applications must include the components listed in Attachment 5-3, and the general and permit-specific conditions listed in Attachment 5-4. Typically, an Individual Certification application to EPA is prepared as a stand-alone document paraphrasing and/or attaching the data provided in the NWP PCN submittal or Individual Permit application.

2. Individual Certification Application to the White Mountain Apache Tribe

Currently, there is no specific format or application form required for the WMAT, however there are specific requirements that must be included in a request for a 401 certification. These requirements are contained in Attachment 5-7. The Individual Certification application to the WMAT is prepared as a stand-alone document and mailed to the Tribe.

3. Individual Certification Application to the Arizona Department of Environmental Quality

ADEQ has developed two standard Individual Certification application forms, included in Attachment 5-5 and Attachment 5-6, respectively:



- ADEQ/Water Quality Division (WQD) Application for Clean Water Act Section 401 Certification; requires general description and impact data for the activity
- ADEQ/WQD Form 404-003 (ADEQ 1994)—entitled Applicant's Response to the Arizona Department of Environmental Quality Policy for Protecting Water Quality During Facility Construction; requires descriptions of procedures, policies, and/or facilities that will minimize surface water pollution and demonstrate compliance with 15 state water quality policies

Typically, ADEQ/WQD Application for Clean Water Act Section 401 Certification paraphrases and/or attaches the data provided in a NWP or Individual Permit application. ADEQ/WQD Form 404-003 (ADEQ 1994) typically paraphrases and/or attaches the activity-specific conditions and mitigation measures included in a NWP PCN submittal or Individual Permit application, as well as specifications from the ADOT Standard Specifications for Road and Bridge Construction (ADOT 2000).

All certification requirements applicable to an activity must be reviewed by design personnel and District staff and will be included in the environmental clearance and/or project specifications, as appropriate.

Individual certification applications are ultimately forwarded by EPG to the EPA, ADEQ, WMAT, Navajo Nation, or Hualapai Tribe for their consideration and approval.

